

In the
Supreme Court of Ohio

LARRY J. MORETZ, et al.,

Plaintiffs-Appellees,

Case No. 12-0797

v.

KAMEL MUAKKASSA, M.D.,

Defendant-Appellant.

On Appeal from the Summit County
Court of Appeals, Ninth Appellate District
(No. CA-25602)

**MERIT BRIEF OF AMICI CURIAE OHIO INSURANCE INSTITUTE AND
PROPERTY AND CASUALTY INSURANCE ASSOCIATION OF AMERICA
IN SUPPORT OF APPELLANT**

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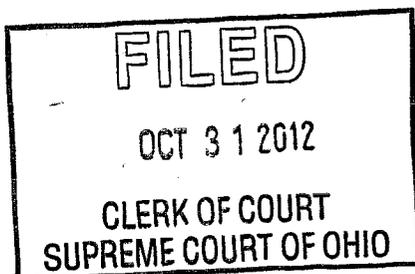
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STATEMENT OF INTEREST OF AMICI CURIAE

Insurance is one of the largest industries in Ohio. Many major insurers have chosen to domicile here, creating jobs and generating business activity that benefits all Ohio citizens and all levels of state and local government. Amici curiae Ohio Insurance Institute (“OII”) and Property and Casualty Insurance Association of America (“PCI”) are concerned about the Court of Appeals’ ruling in this case, which imposes substantial and unwarranted expert witness expenses on litigants in personal injury actions. There is no legal or logical reason to require expert witness testimony that the actual amounts charged for medical services are reasonable, when the initial charges for the services, before the actual charges are determined, are admissible into evidence without such testimony. If the ruling below is not reversed by this Court, these costly and wholly unnecessary expert witness fees must be borne by litigants or their insurers, including the members of OII and PCI.

OII is a professional trade association representing property and casualty insurance companies throughout Ohio. Its members include domestic insurers, foreign insurers, and reinsurers, who collectively account for approximately one-half of the property and casualty insurance coverage written in this State, as well as insurance industry trade groups and organizations. OII provides a wide range of insurance-related services to its members and to the public, media, and government officials in three primary areas: education and research; legislative and regulatory affairs; and public information. In connection with those services, OII closely monitors legislation and judicial decisions that address important issues of insurance law, and it has participated as an amicus in several significant insurance cases before this Court.

PCI is a national trade organization composed of more than 1,000 member companies who write in excess of \$190 billion in annual premiums, representing the broadest cross-section of insurers of any national trade association. PCI has a very diverse membership, ranging from

large national insurance companies and mid-size regional insurers, to single-state insurers and specialty companies that serve specific insurance markets. They provide 46 percent of the nation's automobile insurance, 32 percent of homeowner's insurance, 38 percent of commercial property and liability insurance, and 41 percent of private workers' compensation coverage. Like OII, PCI participates as an amicus in appeals that raise important issues affecting insureds, insurers, and insurance law. Both PCI and OII are uniquely qualified to provide this Court with a broad prospective on insurance law generally, as well as practical insight into the specific issues raised by this appeal.

OII and PCI are especially interested in the ruling by the Court of Appeals that is addressed by appellant's fourth proposition of law. It held that evidence of the actual charges that medical providers agree to accept as full payment for their medical services is inadmissible in the absence of expert testimony that the charges are reasonable. In Ohio, personal injury litigants have not been required to present expert testimony as to the reasonableness of charges for medical treatment since R.C. 2317.421 was enacted in 1970. In the meantime, many medical providers have adopted fee schedules that charge different patients different amounts for the same medical services, depending upon whether the provider has entered into a fee agreement with the patient's insurer under which negotiated, reduced charges are accepted by the provider as payment in full for the medical services, regardless of the amount that other patients are charged for those services.

There is no legal justification for the Court of Appeals' conclusion that the different amounts charged by a medical provider for treatment should be subject to different standards of admissibility. It acknowledged this Court's previous holdings that both the initial charges for treatment and the actual amount that is later accepted by the provider as payment in full, after

insurance coverage is determined, are admissible evidence of the reasonable cost of the treatment. See *Jaques v. Manton*, 125 Ohio St.3d 342, 2010-Ohio-1838, 928 N.E.2d 434, and *Robinson v. Bates*, 112 Ohio St.3d 17, 2006-Ohio-6362, 857 N.E.2d 1195. But the Court of Appeals undermined those rulings by holding that the initial amount of medical charges is admissible without any expert testimony that they are reasonable, while the actual amount that was later accepted as full payment is not admissible in the absence of such testimony. Nothing in this Court's previous rulings or in Ohio statutory law supports that conclusion. If the decision below were allowed to stand, it would unnecessarily and unfairly increase the expenses of virtually all personal injury trials for insurers and for uninsured litigants.

There is also no logical justification for ignoring the modern reality that medical providers routinely charge different amounts for the same treatment, depending upon whether the provider has a contractual fee arrangement with the patient's insurer. Patients receive a preliminary bill or statement from their medical providers that indicates the date and nature of the medical services and the initial amount of the charges for that treatment. After insurance coverage is determined, an insured patient receives a bill or statement from the provider that indicates the date and nature of the medical services, the initial amount of the charges, and the actual amount of the charges that the provider agreed to accept as full payment for the services. In both instances, the bill or statement reflects an amount that the medical provider considers reasonable for its treatment of that patient.

The Ohio General Assembly enacted R.C. 2317.421 to simplify and economize proof of damages for medical expenses in personal injury and wrongful death actions. The statute provides that a "written bill or statement, or any relevant portion thereof" that itemizes the date, type, and cost of medical services is "prima facie evidence of the reasonableness of any charges

and fees stated therein,” as long as a copy of the bill or statement is delivered to opposing counsel at least five days prior to trial. Before R.C. 2317.421 was enacted, Ohio courts “require[d] the usually empty ceremonial of having a doctor testify that the charge he made for a particular service is a reasonable and customary one.” *DeTunno v. Shull*, 166 Ohio St. 365, 377, 143 N.E.2d 301, 308 (1957) (Bell, J., concurring). By eliminating the need for expert testimony that medical charges are reasonable, the statute allows parties to save time and money at trial and allows courts to conserve their judicial resources.

R.C. 2317.421 has achieved that goal for over 40 years without substantial appellate litigation and interpretation, and it is congruent with medical providers’ modern billing practices. No one claims that bills and statements showing the actual amounts ultimately charged for medical services are less accurate or require more verification than bills and statements that show the hypothetical amounts the patient would have been charged in the absence of insurance coverage. The Court of Appeals has imposed an expensive and time-consuming expert witness requirement on the provider’s actual charges to solve a problem that does not exist.

Members of OII and PCI are among those who will have to pay unnecessary and unfair expert witness expenses, in order to admit undisputed evidence of actual medical charges, if the ruling below is not reversed. Moreover, trial proceedings in personal injury actions will be disrupted, prolonged, and delayed so that expert witnesses can ceremoniously confirm those undisputed charges. For the reasons set forth below, OII and PCI urge the Court to adopt appellant’s Proposition of Law No. 4.

STATEMENT OF FACTS

Amici curiae OII and PCI adopt and incorporate the Statement of the Case and Facts presented in Appellant's Merit Brief. There is no dispute as to any fact that is relevant to the issues raised in this appeal.

ARGUMENT

Proposition of Law No. 4:

The amount that a patient was actually charged as full payment for medical services is admissible into evidence at trial without expert testimony that the charges are reasonable.

The Court of Appeals correctly recognized in its ruling below that the collateral-source rule does not bar evidence that a medical provider charged less than the amount of its original bill as full payment for its medical services. That question was resolved by this Court in *Jaques v. Manton*, 125 Ohio St.3d 342, 2010-Ohio-1838, at ¶¶ 15-16, 928 N.E.2d 434 (holding that Ohio's statutory collateral-source rule, R.C. 2315.20, "does not prohibit evidence of write-offs" and that "evidence of write-offs is admissible to show the reasonable value of medical services"), and *Robinson v. Bates*, 112 Ohio St.3d 17, 2006-Ohio-6362, at ¶¶ 6-7, 857 N.E.2d 1195 (holding that Ohio's common law collateral-source rule "does not bar evidence of the amount accepted as full payment for medical services" and that "the amount actually paid can be submitted to prove the value of medical services").

As a result, the admission of evidence that a plaintiff's initial medical bills were written down is subject to the same rules and statutes that govern the admissibility of evidence generally. See *Jaques*, supra, 2010-Ohio-1838, at ¶ 15. These include R.C. 2317.421, which provides:

In an action for damages arising from personal injury or wrongful death, a written bill or statement, or any relevant portion thereof, itemized by date, type of service rendered, and charge, shall, if otherwise admissible, be prima facie evidence of the reasonableness of any charges and fees stated therein...if the party

offering it delivers a copy of it, or the relevant portion thereof, to the attorney for each adverse party not less than five days before trial.

See *Basye v. Whitlock*, 10th App. Dist. No. 81-AP-314, 1981 Ohio App. Lexis 12834, at *6 (“[p]ursuant to [R.C. 2317.421], the reasonableness of the value of [medical] services may be established by the introduction of itemized billings for those services”).

In *Wagner v. McDaniels*, 9 Ohio St.3d 184, 186, 459 N.E.2d 561 (1984), this Court explained that “proof of the amount paid or the amount of the bill rendered and of the nature of the services performed constitutes prima facie evidence of the reasonableness of the charges for medical and hospital services,” and that requiring expert testimony as to the reasonableness of the charges “would amount to little more than ‘the usually empty ceremonial’ [of having doctors testify that their charges are reasonable].” (Citation omitted.)

In the present case, the Court of Appeals properly admitted evidence of the amounts that plaintiff was preliminarily charged for his medical treatment, as evidence of the reasonableness of those charges, without requiring expert testimony on that issue. It erred, however, in refusing to admit evidence of the charges that were actually owed for the medical treatment (and that were accepted by the medical provider as full payment) in the absence of expert testimony that those charges were reasonable. The Court of Appeals erroneously assumed that the statutory presumption created by R.C. 2317.421 applies only to the preliminary charges and not to the actual charges:

For plaintiffs seeking to present amounts charged as evidence of the reasonable value of medical services rendered, the General Assembly has codified a rebuttable presumption in that regard, obviating the need for expert testimony. R.C. 2317.421.... Despite the Ohio Supreme Court’s holding in *Jaques* [supra] that...evidence [of reduced charges] is relevant and admissible, there is no presumption or shortcut available to allow such evidence to be introduced without a proper foundation...[i.e.,] competent expert testimony.

2012-Ohio-1177, at ¶¶ 41-42.

There is no language in R.C. 2317.421 that states or implies that it is limited to evidence of the amounts of the preliminary charges, before they are adjusted to show the actual charges for the medical services. Similarly, there is no language in the statute suggesting that evidence of the actual charges, which are accepted by the medical provider as payment in full, are not admissible without expert testimony.

Not surprisingly, this Court also made no distinction between the original medical charges and the actual medical charges in either of the two decisions in which it has specifically addressed their admissibility. In *Robinson*, supra, 2006-Ohio-6362, at ¶¶ 9, 11, it discussed the admissibility of medical charges under R.C. 2317.421 and held:

[T]he reasonable value of medical services is a matter for the jury to determine from all relevant evidence. Both the original medical bill rendered and the amount accepted as full payment are admissible to prove the reasonableness and necessity of charges rendered for medical and hospital care.

The Court did not require expert testimony that the actual charges accepted as full payment were reasonable. It held that “both the original medical bill rendered and the amount accepted as full payment for medical services should have been admitted pursuant to R.C. 2317.421.” *Id.*, at ¶ 6. If evidence of the actual charges that were accepted as full payment was not admissible under the statute without expert testimony, the Court would have mentioned that requirement. Instead, it affirmed the Court of Appeals’ ruling that the amounts of the actual charges were properly admitted into evidence at trial. See *id.*, at ¶ 26 (“[t]he jury should have been permitted to examine both the original medical bill and the amount accepted as full payment to determine the reasonableness and necessity of charges rendered for Robinson’s medical and hospital care”).

More recently, in *Jaques*, supra, 2010-Ohio-1838, at ¶¶ 1, 5, 15, this Court again discussed the rebuttable presumption established by R.C. 2317.421 and again concluded that “the

amount accepted by a medical provider as full payment for treatment of the plaintiff is admissible” to prove the reasonable value of the charges. As in *Robinson*, supra, the Court’s opinion in *Jaques* did not intimate in any way that expert testimony is required to admit evidence of the actual charges but is not required to admit evidence of the initial charges, despite the obvious significance that such a rule would have had for the Court’s decision.

Twenty-five years earlier, in *Wagner*, supra, paragraph one of the syllabus, this Court held that “[p]roof of the amount paid [for medical treatment] or the amount of the bill rendered and of the nature of the services performed constitutes prima facie evidence of the necessity and reasonableness of the charges.” Prima facie evidence establishes a fact, subject to rebuttal, without the need for additional evidence of that fact. Accordingly, Ohio appellate courts have considered evidence of the amounts actually charged for medical services without suggesting that the reasonableness of those charges was established by, or was dependent upon, expert testimony. See, e.g., *Coburn v. Auto-Owners Ins. Co.*, 189 Ohio App.3d 322, 2010-Ohio-3327, at ¶47, 938 N.E.2d 400 (10th App. Dist.) (holding that “both the original medical bill and the amount accepted as full payment are admissible to prove the reasonable value of medical services”); *Salvatore v. Findley*, 10th App. Dist. No. 07AP-793, 2008-Ohio-3294, at ¶¶ 3, 17 (holding that the trial court properly denied plaintiff’s motion to exclude evidence of the amounts written off his medical bills, even though the plaintiff’s treating physician, who was the only witness who addressed the amount of the reduced charges, did not provide expert testimony that they were reasonable). There is no legal basis for the Court of Appeals’ ruling in the present case that expert testimony is required in these circumstances.

There is also no logical basis for the distinction made by the Court of Appeals between the preliminary charges for medical treatment and the actual charges for the treatment. First,

there is no relevant practical or theoretical difference between them, and both amounts are prima facie evidence of reasonableness within the scope of R.C. 2317.421. The statutory presumption applies to any “written bill or statement, or any relevant portion thereof, itemized by date, type of service rendered, and charge.” R.C. 2317.421. The medical provider’s original bill or statement contains that information and the initial charges, and its final bill or statement (prepared after the effect of insurance coverage has been determined) contains the same information as well as the actual charges.

The preliminary bill is prima facie evidence of the reasonableness of the initial charges because it reflects the amount that the provider considers reasonable for patients who are not insured. Similarly, the final bill is prima facie evidence of the reasonableness of the actual charges because it reflects the amount that the provider considers reasonable for insured patients. Both the preliminary bill and the final bill are therefore prima facie evidence of reasonableness, for the same reason, and there is no logical basis for requiring expert testimony for one but not for the other. Accordingly, R.C. 2317.421 does not differentiate between the provider’s original charges, as documented in its bills and statements, and the provider’s actual charges, as documented in its bills and statements; both constitute prima facie evidence that the charges are reasonable, and both are subject to the same statutory presumption.

Second, evidence of the actual, reduced charges would be admissible under Ohio law even if R.C. 2317.421 contained language that limited the statutory presumption to the charges in the provider’s initial bill, because the reduced charges are relevant evidence that rebuts that presumption. “Defendants are permitted to present evidence that the amount billed is not reasonable.” *Jaques*, supra, 2010-Ohio-1838, at ¶ 5 (citations omitted). “Both the original medical bill rendered and the amount accepted as full payment are admissible to prove

reasonableness.” *Robinson*, supra, 2006-Ohio-6362, at ¶ 17. Inasmuch as the amount of the actual charges accepted as full payment is relevant to the jury’s assessment of the reasonableness of the initial bill, it is proper evidence to rebut the statutory presumption applicable to the initial bill. “[T]he reasonable value of medical services is a matter for the jury to determine from all relevant evidence.” *Robinson*, supra, 2006-Ohio-6362, at ¶ 7.

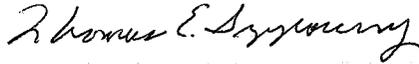
Indeed, the reduced amounts that are actually charged for medical services are a more accurate measure of the plaintiff’s pecuniary loss than the preliminary amounts set out in the original bill. “Compensatory damages are intended to make whole the plaintiff for the wrong done to him or her by the defendant” and to reflect “the actual loss” to the plaintiff. *Fantozzi v. Sandusky Cement Products Co.*, 64 Ohio St.3d 601, 612, 497 N.E.2d 474 (1992). Accordingly, R.C. 2315.18(A)(2)(b) limits the “economic loss” that is recoverable as damages in a tort action for medical expenses to “[a]ll *expenditures* for medical care or treatment....” (Emphasis added.) See also R.C. 2323.43 (similarly defining economic loss in a medical claim). But “no one pays the write-off” when a medical bill is adjusted for an insured patient, and “it cannot possibly constitute payment.” *Robinson*, supra, 2006-Ohio-8362, at ¶ 16.

In short, the expert witness requirement adopted by the Court of Appeals is not supported by this Court’s previous decisions regarding reduced medical charges. It is also incompatible with the language of R.C. 2317.421 and inconsistent with the definition of compensable economic damages under Ohio law. There is no reason for the Court to impose these unnecessary expert witness expenses on litigants and further complicate and prolong trial proceedings over undisputed medical charges.

CONCLUSION

For the reasons set forth above, amici curiae Ohio Insurance Institute and Property and Casualty Insurance Association of America respectfully urge the Court to adopt appellant's Proposition of Law No. 4 and reverse the ruling by the Court of Appeals in this matter.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing *Merit Brief of Amici Curiae Ohio Insurance Institute and Property and Casualty Insurance Association of America in Support of Appellant* was served by U.S. mail this 31st day of October, 2012, on the following:

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